United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75 4248

To be argued by
James B. Lewis

UNITED STATES COURT OF APPEALS
for the Second Circuit

ESTATE OF AMY ANN McGINNIS SPALDING,
Deceased, CHARLES F. SPALDING,
Executor,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

On Appeal from the United States Tax Court

REPLY BRIEF FOR PETITIONER-APPELLANT

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REPLY BRIEF FOR PETITIONER-APPELLANT

ARGUMENT

I. The Doctrine of Stare Decisis Calls For Reversal of the Tax Court's Decision Below.

As we read the briefs, those for the taxpayer and the Commissioner, on one proposition there is accord: Under the doctrine of stare decisis this Court would hold (1) that the

decedent Amy and her executor Charles were "husband and wife" under section 6013 of the Internal Revenue Code (the "Code"), so that Amy could file a joint income tax return with Charles and (2) that Amy was the "spouse of" Charles under section 151 et seq. of the Code, so that Charles could claim Amy and Amy's children as dependents for income tax purposes. Appellant's Brief 3-6; Appellee's Brief 18-22. Borax's Estate v. Commissioner, 349 F.2d 666 (2d Cir. 1965), cert. denied, 383 U.S. 935 (1966); Wondsel v. Commissioner, 350 F.2d 339 (2d Cir. 1965), cert. denied, 383 U.S. 935 (1966).

It follows that this Court would also hold that Amy was Charles's "surviving spouse" for the purpose of section 1(a)(2) of the Code, which imposes the same rates of income tax on a "surviving spouse" for the two taxable years following the death of his or her spouse as are imposed on a husband and wife filing a joint return.

The Commissioner's argument that the rule of stare decisis is not dispositive of the instant case may, therefore, be stated as follows: Although, under the "rule of validation" announced in Borax, Amy was Charles's "surviving spouse" for income tax purposes, she was not his "surviving spouse" for the purposes of the estate tax marital deduction provided by section 2056(a) of the Code.

There is no basis either in the language of the statute or in the underlying Congressional policy for the curious distinction the Commissioner laboriously urges upon this Court. Under the doctrine of stare decisis, the decision of the Tax Court below should be reversed.

II. The Commissioner Has Failed to Distinguish This Court's Decisions in Borax and Wondsel.

We shall briefly respond to each of the purported grounds on which the Commissioner urges this Court to limit the application of Borax and Wondsel.

A. The Congressional Purpose.

The Commissioner discusses lengthily but inconclusively the Congressional purpose in 1948 to adjust the burden of the estate tax more fairly between the community property and common law property systems. Appellee's Brief 12-14, 25.

We are not sure what point the Commissioner is attempting to make. If he is suggesting that reversal of the Tax Court in this case would upset the supposed perfect geographical balance of the mechanism created by Congress in 1948, his suggestion cannot be taken seriously. The substantial failure of the marital deduction to equate taxation of the two property systems has been perceptively described. Surrey, Federal Taxation of the Family--the Revenue Act of 1948, 61 Harv. L. Rev. 1097, 1154-59 (1948).

B. The Committee Reports.

The Commissioner notes that the 1948 Congressional committee reports that accompanied enactment of the estate tax marital deduction stated that marital status, for the purposes of that deduction, "is determined at the time of the decedent's death" and that a legal separation that has "not (at the time of the decedent's death) terminated the marriage" does not affect marital status. Appellee's Brief 15, 16, 24, quoting from S. Rep. No. 1013 (Part 2), 80th Cong., 2d Sess., reproduced at 1948-1 Cum. Bull. 331, 335.

The first of the two sentences quoted from the committee report is concerned only with the time as of which marital status is to be determined. There are income tax provisions devoted to the same subject, sections 153(1) and 6013(d)(1) require that marital status for personal exemption and joint return purposes be determined at the close of the taxable year or, if either spouse dies during the taxable year, at the time of such death. Neither the income tax nor the estate tax rules relating to time of determination of marital status shed any light on the problem of choice of law resolved by this Court in Borax and Wondsel.

We fail to understand what comfort the Commissioner derives from the second quoted sentence, which indicates only

that a legal separation under a decree of divorce or separate maintenance does not terminate the marital relationship for estate tax marital deduction purposes.[1/] The divorces in this case and in Borax and Wondsel were, or were intended to be, a vinculo matrimonii. They were the kind of divorce that, if recognized, terminates marriage for estate as well as income tax purposes. The tax classification of a decree of limited divorce or separate maintenance is simply not relevant.

C. Federal Tax Concept of Marital Status.

The Commissioner argues that application of the principle of Borax and Wondsel to the estate tax marital deduction would create the "anomaly" of a federal tax concept of marital status that would be contradictory with state death tax, dower and intestacy laws.[2/] Appellee's Brief 28-29.

This is a strange argument for the Commissioner to make, in view of the many successes he has had in persuading the courts, in federal tax cases, to reject state definitions

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1/ Such a legal separation does, however, terminate the marital relationship for income tax joint return and personal exemption purposes. Code sections 153(2) and 6013(d)(2).

2/ Several state death tax laws are patterned on the Federal estate tax statute, either directly (as in the case of New York) or as devices for the absorption of the credit for state taxes allowed by section 2011 of the Code (as in the case of Florida). The contradiction deplored by the Commissioner would not arise in such situations.

of such terms as partnership, power of appointment, "passing" under exercise of a power, future interest, inheritance, sale, and administration expense. Commissioner v. Tower, 327 U.S. 280 (1946); Rogers' Estate v. Commissioner, 320 U.S. 410 (1943); United States v. Pelzer, 312 U.S. 399 (1941); Morgan v. Commissioner, 309 U.S. 78 (1940); Lyeth v. Hoey, 305 U.S. 188 (1938); Burnet v. Harmel, 287 U.S. 103 (1932); Smith's Estate v. Commissioner, 510 F.2d 479 (2d Cir.), cert. denied, U.S. (1975). "[T]he revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application." United States v. Pelzer, supra at 402. Otherwise, "federal tax legislation would be the victim of conflicting state decisions on matters relating to local concerns and quite unrelated to the single uniform purpose of federal taxation." Rogers' Estate v. Commissioner, supra at 414. A state "cannot, by its decisions and laws governing questions over which it has final say, also decide issues of federal tax law." Commissioner v. Tower, supra at 288.

Under this principle there is no "anomaly" if the definition of marital status for federal tax purposes departs, in the interest of uniform application of federal taxation, from the state definition.

D. The Alleged Multiple Spouse Problem.

The Commissioner naively observes that Congress intended to use the term "surviving spouse" in the singular and that application of Borax and Wondsel here could lead to the argument that, for federal estate tax purposes, "the decedent had two 'surviving spouses.'" Appellee's Brief 16, 29-31, citing the facts of the Goldwater case.[3/]

The first statement is true; the second is not. Under the "rule of validation" of Borax and Wondsel, as applied to the Goldwater case, Lee (Goldwater's second wife) is his only "surviving spouse."

E. Disallowance of Marital Deduction Under the Borax Rule.

The Commissioner notes that application of the principle of Borax and Wondsel to the estate tax might result in a lesser marital deduction in some cases than would be provided by the alternative rule urged by the Commissioner. Appellee's Brief 31-32.

Obviously, where, as in the Goldwater case, the decedent bequeaths an amount of property to his second wife and

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3/ Estate of Leo J. Goldwater, 64 T.C. 540 (1975), on appeal to 2d Cir.

his executors pay the first wife some amount in settlement of her claim against the estate, there is no conceivable rule that will not disqualify one or the other amount. The rule of validation of Borax is no more subject to criticism on this ground than the alternative rule urged by the Commissioner.

F. The Nevada Residence Requirement.

The Commissioner speculates that Charles may not have complied with the six-week residence requirement of Nevada law and, therefore, that the State of Nevada might not sustain its own decree. Appellee's Brief 11 (note 6), 17 (note 8) and 32 (note 17).

The Commissioner did not question Charles's compliance with the Nevada residence requirement in the proceeding below, nor did the Tax Court do so. If the question had been raised below, evidence of compliance would have been introduced. It is inappropriate for the Commissioner to raise the issue for the first time on appeal. Ansul Company v. Uniroyal, Inc., 448 F.2d 872, 886 (2d Cir. 1971); Schwartz v. S.S. Nassau, 345 F.2d 465, 466 (2d Cir.), cert. denied, 382 U.S. 919 (1965).

III. The Commissioner's Argument that the Borax and Wondsel Decisions Are Erroneous Is Unsound.

There is, as we have shown, no indication whatever that Congress, in enacting the Revenue Act of 1948, had in mind

the subject of remarriage following a migratory divorce of questionable validity. This Court's task in Borax was to "try to divine how . . . [Congress] would have dealt with the unforeseen situation" (Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (L. Hand, C.J., concurring));--- "to guess what . . . [Congress] would have intended on a point not present to its mind, if the point had been present" (J. Gray, Nature and Sources of the Law: Statutes 1973 (1921)).

Without minimizing the difficulties of this Delphic process, one may confidently hypothesize that Congress, had the subject been brought to its attention, would not have validated such remarriages for income tax joint return purposes and invalidated them for estate tax marital deduction purposes. Under that sound hypothesis, Borax and Wondsel are dispositive of the instant case. Indeed, the Borax opinion itself describes the rule of validation announced in that case as "depriving the determination of invalidity of any federal tax significance." 349 F.2d at 670. (Underscoring supplied.)

In an effort to escape from this dilemma, the Commissioner invites this Court to repudiate Borax and Wondsel if the Court would otherwise find those decisions controlling here. Appellee's Brief 18, 25-27. His published rulings on the subject, says the Commissioner, are a sounder and more "expedient solution to the many factual variations which may occur" than this Court's decisions. Appellee's Brief 33.

We shall, in view of the Commissioner's suggestion, describe his administration of this area of taxation. The Commissioner accepts the validity of an ex parte divorce decree which has not been held invalid in private litigation. G.C.M. 25250, 1947-2 Cum. Bull. 32; Rev. Rul. 57-113, 1957-1 Cum. Bull. 106. Only "where a state court . . . declares the prior divorce to be invalid" does the Commissioner question it. Rev. Rul. 67-442, 1967-2 Cum. Bull. 65, 66. In the latter case, but not in the former, the Commissioner will challenge the validity of a subsequent marriage even though--as is here the case--that marriage stands unchallenged in the jurisdictions in which it was contracted and in which the decedent was domiciled at death.

In short, the Commissioner does not make any attempt on his own to determine whether a divorce is valid or invalid under state law. If the divorce is declared invalid in private litigation, however, he accepts as final the state court decision on the subject. The federal tax consequences thus turn on the decision of the stationary spouse (or, in Steffke,[4/] the state tax collector) to accept the foreign divorce decree or to attack it in the state court.

Borax and Wondsel rightly rejected the Commissioner's capricious and inconsistent administration of this area of taxation and withdrew from the stationary spouse the discretion

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4/ Estate of Wesley A. Steffke, 64 T.C. 530 (1975), on appeal to 7th Cir.

to fix tax consequences. In so doing, Borax and Wondsel promoted uniformity in the application of the federal tax provisions relating to marital status. "[B]y depriving the determination of invalidity of any federal tax significance the rule of validation avoids a measure of unevenness and uncertainty: all those taxpayers who have obtained a divorce in a particular jurisdiction are treated the same, regardless of whether the spouse against whom the decree has been obtained is able to, and does, invoke the power of another jurisdiction to declare that divorce invalid." 349 F.2d at 670.

Under this federal principle of choice of law, the living marriage and not the atrophied one is recognized. Normally, as in this case, it is the spouse of the living marriage who will be the object of the deceased spouse's bounty. Th Congressional objective of postponing taxation of the interspousal transfer until the death of the survivor is best realized under the Borax rule of validation.

The Borax rule of validation also frees the federal tax system from conflict of law questions of purely private and local concern. If a taxpayer is divorced in a foreign country on grounds that some but not all of the states will recognize under principles of comity, and is remarried in a state that would recognize the validity of the divorce, the availability of a marital deduction for the spouses in the second marriage

would apparently depend, under the Commissioner's rule, on their future choice of domicile. If the divorcing jurisdiction is one of the states, and a sister state with jurisdiction declares the divorce invalid, the availability of a marital deduction to the spouses in the second marriage would, under the Commissioner's rule, depend upon being domiciled in the divorcing jurisdiction.

In his attack upon Borax, the Commissioner indulges in, and quotes from a law review article that engages in, a specious reconstruction of legislative history. Appellee's Brief 25-27. According to the Commissioner, Borax is correct on the alimony issue but wrong on the joint return issue. The error in that reasoning is easily demonstrated. The Congressional intention in 1948 (as this Court noted in Borax, 349 F.2d at 675) was that "a uniform construction" be given to the provisions relating to marital status, including those related to joint returns and to alimony. S. Rep. No. 1013, 80th Cong., 2d Sess., reproduced at 1948-1 Cum. Bull. 285, 324.

This Court should reject the Commissioner's suggestion that the Court repudiate the Borax rule of validation and that it embrace, instead, a rule of his own device that is demonstrably arbitrary and capricious and has demonstrably been so administered.

CONCLUSION

For the reasons stated above and in our opening brief, the decision of the Tax Court should be reversed.

Dated: New York, New York
March 8, 1976

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

The undersigned being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at 340 East 51st Street, New York, New York 10022.

That on the 8th day of March, 1976, deponent served four copies of the annexed reply brief on Scott P. Crampton, attorney for the Commissioner of Internal Revenue in this action at:

Scott P. Crampton, Esq.
Assistant Attorney General
Tax Division
Department of Justice
10th Street & Constitution Avenue
Washington, D.C. 20530

the address designated by said attorney for that purpose by depositing four true copies of same enclosed in a postpaid

properly addressed wrapper, in - a post office - official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

James K. Dreyfus

JAMES K. DREYFUS

Sworn to before me this
8th day of March, 1976.

Mollie Singerman

Notary Public

MOLLIE SINGERMAN
Notary Public, State of New York
No. 31-3687200
Qualified in New York County
Commission Expires March 30, 1977

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